

908 KAR 3:190. Drug testing procedures at a state-operated facility for an individual with mental illness, developmental, or intellectual disabilities.

RELATES TO: KRS 218A.050, 218A.070, 41 U.S.C. 701 -707

STATUTORY AUTHORITY: KRS 194A.050, 210.010, 210.040, 210.055, 210.285

NECESSITY, FUNCTION, AND CONFORMITY: KRS 210.010 authorizes the secretary of the Cabinet for Health and Family Services to prescribe administrative regulations for the administration of the cabinet and of the institutions under the control of the cabinet. KRS 194A.050 also empowers the secretary to promulgate administrative regulations to carry out cabinet programs. This administrative regulation establishes the procedures for the drug testing of employees and contractors of state-operated institutions for an individual with mental illness, developmental, or intellectual disabilities.

Section 1. Definitions.

- (1) "Administrator on duty" means a facility employee charged with decision-making authority for the facility during the employee's given work shift.
- (2) "Applicant" means an individual seeking employment in a test-designated position at a facility operated by the department.
- (3) "Appointing authority" means the Secretary of the Cabinet for Health and Family Services or designee
- (4) "Commissioner" means the Commissioner of the Department for Behavioral Health, Developmental, or Intellectual Disabilities or the commissioner's designee.
- (5) "Confirmatory test" means a second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the initial test and which uses a different technique and chemical principle from that of the initial test in order to ensure reliability and accuracy
- (6) "Controlled substance" is defined in KRS 218A.010(5).
- (7) "Department" means the Department for Behavioral Health, Developmental, or Intellectual Disabilities.
- (8) "Dilute specimen" means a drug test urine specimen in which the creatinine concentration is less than 20 mg/dL and the specific gravity is less than 1.003.
- (9) "Donor" means the individual from whom a urine specimen is collected.
- (10) "Drug" is defined in KRS 218A.010(11).
- (11) "Employee" means a person employed at or by a facility for the care and treatment of an individual with mental illness, developmental, or intellectual disabilities operated by the department.
- (12) "Initial test" means an immunoassay test to eliminate negative urine specimens from further consideration and to identify the presumptively positive specimens that require confirmation or further testing.
- (13) "Failed drug test" means a circumstance in which a test-designated employee, who is directed to submit to a drug test, engages in any of the following actions:
 - (a) Fails to submit to or complete a drug test;
 - (b) Interferes with a drug test procedure;
 - (c) Tampers with a drug test specimen; or
 - (d) Has a second drug test conducted pursuant to Section 13(1) of this administrative regulation reported as a dilute specimen.
- (14) "Negative drug test" means the results of a drug test administered with a test-designated employee in which the drug test specimens test below the cutoff levels as specified in the "Mandatory Guidelines for Federal Workplace Drug Testing Programs"
- (15) "Officer" means the Drug Testing Coordinating Officer designated by each department operated facility or the officer's designee.

(16) "On duty" means being engaged in the performance of work responsibilities for the employer.

(17) "Positive drug test" means the results of a drug test administered with a test-designated employee in which the drug test specimens test at or above the cutoff levels as specified in the "Mandatory Guidelines for Federal Workplace Drug Testing Programs".

(18) "Random selection" means a statistically valid computer generated procedure utilized to determine test-designated employees selected to submit to random drug testing.

(19) "Reasonable suspicion" means the quantity of proof or evidence, based on specific, objective facts and rationally derived inferences from those facts about the conduct of an individual that would lead a reasonable person, based upon training and experience, to suspect that the individual has been misusing or abusing a controlled substance or a prescription or nonprescription medication in violation of this administrative regulation.

(20) "Return to duty" means the circumstances and conditions under which a test-designated employee is allowed to resume the employee's regular work duties if the employee has had a positive or failed drug test result reported or has voluntarily disclosed the abuse or misuse of a controlled substance, prescription medication, or nonprescription medication, and has met the criteria specified in Section 5(3) of this administrative regulation.

(21) "Sample" means a representative portion of a urine specimen or quality control sample used for testing.

(22) "Specimen" means the portion of urine that is collected from a donor during a drug test.

(23) "Test-designated employee" means an individual employed at or by a facility for the care and treatment of an individual with mental illness, developmental, or intellectual disabilities operated by the department and who meets any of the following conditions:

- (a) Provides direct health care or treatment services to a resident of the facility;
- (b) Has regular unsupervised access to residents of the facility; or
- (c) Has unsupervised access to controlled substances.

(24) "Voluntary disclosure" means the willful and uncoerced admission by a test-designated employee concerning the employee's misuse or abuse of a controlled substance or prescription or nonprescription medication or that the employee has entered into substance abuse treatment.

Section 2. Applicability.

(1) The department shall implement a test-designated facility employee drug testing program in accordance with the provisions of this administrative regulation and the "Mandatory Guidelines for Federal Workplace Drug Testing Programs".

(2) This administrative regulation applies to test-designated applicants and test-designated employees at a facility for the care and treatment of an individual with mental illness, developmental, or intellectual disabilities operated by the department.

Section 3. Facility Drug Testing Program.

(1) Each department-operated facility shall establish and operate a test-designated employee drug testing program. This program shall be implemented in accordance with this administrative regulation.

(2) As part of this program, each facility shall designate a drug testing coordinating officer.

(3) Each officer shall:

- (a) Serve as the primary point of contact for facility test-designated employee drug testing purposes between the officer's respective facility and the department and between the officer's respective facility and the drug testing vendor;

- (b) Coordinate all facility test-designated employee drug testing activities for the officer's respective facility;
 - (c) Prepare and update approximately quarterly a master roster of all test-designated employees at the officer's respective facility. This roster shall include both state employees and contract employees;
 - (d) Submit the initial and updated master rosters approximately quarterly to the designated contact person with the contracted vendor of drug testing services;
 - (e) Serve as the employee designated at each facility to receive drug testing results from the drug testing vendor;
 - (f) Ensure that an appropriate on-site drug testing area is prepared and maintained at the facility; and
 - (g) Maintain all records pertaining to the facility's drug testing program in a secure and confidential manner. Information contained in these records shall not be disclosed unless authorized by subsection (7) of this section.
- (4) The roster prepared pursuant to subsection (3)(c) of this section, shall include the following information concerning each employee:
- (a) The employee's name;
 - (b) The employee's job title; and
 - (c) The employee's regularly scheduled work shift.
- (5) The officer shall, within two (2) working days of receiving drug testing results or notice of a voluntary disclosure, report these results in writing to their facility director. The officer shall also report in writing to the commissioner within two (2) working days of receiving the drug testing results or notice of a voluntary disclosure, the following information concerning a facility employee who had a positive drug test result reported, failed a drug test or voluntarily disclosed the employee's misuse or abuse of a controlled substance or prescription or nonprescription medication:
- (a) The employee's name;
 - (b) The employee's job title;
 - (c) The results of the employee's drug test;
 - (d) The type of drug test that occurred;
 - (e) The date the employee was placed on directed sick leave status; and
 - (f) Whether disciplinary action will be pursued.
- (6) Except as provided in Section 5(3)(b) of this administrative regulation, all costs associated with conducting preemployment drug testing of prospective test-designated state employees and random and reasonable suspicion drug testing shall be borne by the respective facility requesting the drug testing. Beginning July 1, 2006, all costs associated with conducting preemployment drug testing of prospective test-designated contract employees shall be borne by the contract agency.
- (7) Except as required by KRS 61.870 - 61.884 or expressly authorized or required in this section, the appointing authority or anyone with knowledge shall not release employee information that is contained in the records maintained pursuant to this administrative regulation.
- (8) An employee subject to testing shall be entitled, upon written request, to obtain copies of records pertaining to the employee's drug tests. The appointing authority shall promptly provide the records requested by the employee.
- (9) The appointing authority may disclose information required to be maintained under this administrative regulation pertaining to an employee to that employee or to the decision-maker in a lawsuit, grievance, or other proceeding initiated by the employee, and arising from the results of a drug test administered under the provisions of this administrative regulation, or from the appointing authority's determination that the employee engaged in prohibited conduct (including a worker's compensation,

unemployment compensation, or other proceeding relating to a benefit sought by the employee).

(10) The appointing authority shall release information regarding an employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of this information shall be in accordance with the terms of the employee's consent.

Section 4. Testing of Test-designated Facility Employees.

(1) The appointing authority shall require a test-designated employee, as a condition of prospective or continued employment, to be subject to a drug test as provided in this administrative regulation.

(2) Tests authorized. The following categories of test-designated employee drug testing shall be authorized in accordance with Section 9 of this administrative regulation:

- (a) Reasonable suspicion testing;
- (b) Preappointment testing;
- (c) Follow-up testing; and
- (d) Random selection testing;

Section 5. Positive Drug Test Results or Failed Drug Test.

(1) A test-designated employee who has a positive drug test result reported or who failed a drug test shall be immediately removed from work duties and the employee shall be subject to disciplinary action, up to and including dismissal.

(2) A test-designated employee who has a positive drug test result or who failed a drug test shall be:

- (a) Informed of the positive drug test result or the failed drug test;
- (b) Informed that the facility director is placing the employee on directed sick leave status if a state employee;
- (c) Instructed to leave the facility campus immediately. A state employee shall receive the notice of directed sick leave prior to being instructed to leave the facility campus; and
- (d) Informed that disciplinary action, up to and including dismissal, shall be initiated.

(3) If the resulting disciplinary action specified in subsection (2)(d) of this section is less than dismissal, the employee shall be allowed to return to duty if the employee provides:

- (a) Written documentation, sent directly to the officer from a substance abuse treatment provider verifying that the employee has been evaluated, is compliant with the recommendations of the provider, and that the employee is safe to return to work. The officer shall offer to assist the employee in obtaining substance abuse treatment services; and
- (b) Written documentation the employee's has successfully passed, at the employee's own expense, a drug test from a vendor approved by the officer. This return to duty documentation shall be sent directly from the vendor to the officer.

(4) An employee who was subject to the conditions of Section 4(2) of this administrative regulation and subsection (2)(d) of this section and who subsequently has a second positive drug test result or who fails a drug test shall be:

- (a) Informed of the positive drug test result or the failed drug test;
- (b) Informed that the facility director is placing them on directed sick leave status if a state employee;
- (c) Instructed to leave the facility campus immediately. A state employee shall receive the notice of directed sick leave prior to being instructed to leave the facility campus; and
- (d) Informed that disciplinary action to seek dismissal is being initiated.

(5) this administrative regulation shall not alter the contract agreement between each facility and their contract vendors.

Section 6. Prohibited Behavior. An employee shall not engage in the following activities while on duty or on facility grounds:

- (1) The unlawful manufacture, distribution, sale, dispensation, possession, or use of a controlled substance;
- (2) Consuming or under the influence of a controlled substance illegally obtained;
- (3) The use, misuse, or abuse of prescription or nonprescription medication in a quantity or manner sufficient to impair a test-designated employee's ability to perform assigned duties or in any way that places patient or fellow employee safety at risk; or
- (4) Interfering with a testing procedure or tampering with a test sample.

Section 7. Voluntary Disclosure.

(1) A test-designated state employee who voluntarily discloses the misuse or abuse of a controlled substance or prescription or nonprescription medication shall:

(a) Not be disciplined for self disclosure reporting provided that the self disclosure occurred prior to either of the following:

1. A determination being made that reasonable suspicion drug testing is to occur; or
2. The employee being selected for follow-up or random drug testing;

(b) Receive written notice that the employee is being placed on directed sick leave status if a state employee;

(c) Be directed to leave the facility campus immediately; and

(d) Be subject to the provisions of Sections 4(2)(c) and 5 and of this administrative regulation.

(2) A test-designated state employee who voluntarily discloses entering substance abuse treatment shall:

(a) Not be disciplined for self disclosure reporting provided that the self disclosure occurred prior to either of the following:

1. A determination being made that reasonable suspicion drug testing shall occur; or
2. The employee being selected for follow-up or random drug testing;

(b) Be informed that the employee shall be required to submit to follow-up drug testing; and

(c) Not provide direct care services until the follow-up drug test results are reported.

(3) A test-designated state employee may take advantage of opportunities specified in subsection (1) of this section no more often than two (2) times while employed at a facility. A state employee making a voluntary disclosure shall not be excused from a subsequent drug test or from otherwise complying in full with this administrative regulation. A state employee making a voluntary disclosure shall remain subject to drug testing requirements after making the disclosure and shall be subject to disciplinary action as a result of a subsequent positive drug test result report or a failed drug test.

(4) A test-designated employee of a contract agency who:

(a) Voluntarily discloses the misuse or abuse of a controlled substance or prescription or nonprescription medication or entering substance abuse treatment shall be informed that the employing agency shall be notified of the employee's self disclosure;

(b) Voluntarily discloses the misuse or abuse of a controlled substance or prescription or nonprescription medication or entering substance abuse treatment and dismissal does not occur shall be subject to follow-up drug testing;

(c) Voluntarily discloses the misuse or abuse of a controlled substance or prescription or nonprescription medication shall be instructed to leave the facility campus immediately and shall be informed that the employee shall not be allowed to return to work until the employee is in compliance with Section 5(3) of this administrative regulation.

(5) An employing agency, having been notified pursuant to subsection (4)(a) of this section, shall make a determination as to what disciplinary action, if any, shall be initiated

with its employee, as well as any other condition for continued employment with the agency.

(6) The officer shall offer to assist a test-designated employee who voluntarily discloses the misuse or abuse of a controlled substance or prescription or nonprescription medication in obtaining substance abuse treatment services.

Section 8. Facility Employee Notification.

(1) New test-designated facility employees shall receive information and training concerning this administrative regulation as part of the employee's initial orientation training.

(2) Current test-designated facility employees shall receive information and training concerning this administrative regulation prior to implementation of the test-designated employee drug testing program.

(3) Information and training provided pursuant to subsections (1) and (2) of this section shall include:

(a) Information regarding the type and nature of services and supports available through the Kentucky Employee Assistance Program;

(b) How to access these services and supports; and

(c) The availability of and how to access other local or regional substance abuse treatment services.

(4) The human resources office within each facility shall maintain documentation that all employees have received information and training concerning this administrative regulation.

(5) A test-designated facility employee shall sign a document certifying:

(a) Receipt of information and training concerning this administrative regulation;

(b) An understanding of the requirements, limitations, and restrictions on facility employee conduct contained in this administrative regulation; and

(c) An understanding of the potential consequences, up to and including dismissal, for violation of this administrative regulation.

Section 9. Drug Testing Guidelines.

(1) Random drug testing of test-designated employees shall occur under the following guidelines:

(a) On-site random drug testing of test-designated employees shall occur on approximately a quarterly basis;

(b)

1. The commissioner shall determine:

a. The number and rate of test-designated employees who shall be directed to submit to random drug testing; and

b. The number of random drug tests to be conducted in a given facility in any one (1) year;

2. The number of random drug tests conducted in a given facility shall not exceed fifteen (15) percent of the number of all test-designated employees within the facility in any one (1) year.

(c) Following consultation with and approval by the officer's respective facility director and the commissioner, the officer shall contact the designated contract vendor contact person to schedule and make arrangements for the next session of on-site random drug testing;

(d) The contract vendor shall provide the officer with a roster of the names of employees randomly selected to participate in the next session of on-site random drug testing at least two (2) weeks prior to the scheduled testing date. This roster shall include a sufficient number of alternate selections so as to allow for those employees originally selected to submit to random drug testing and who, for whatever reason, did

not report to work on the scheduled testing date. The officer shall not disclose to any test-designated employee selected for testing the date and time of the scheduled random drug test prior to the date and time the employee is to report for testing;

(e) The officer, following consultation with and approval by the facility director, shall make adequate arrangements to ensure the ongoing orderly operation of the facility while the random drug testing is occurring. These arrangements shall include a master schedule of the order and time when selected employees shall be tested. This information shall not be shared with any employee or supervisor prior to the test date except in accordance with paragraph (f) of this subsection;

(f) The officer shall inform only those facility employees deemed to be absolutely necessary as to date and time of the next scheduled session of on-site random drug testing. A test-designated employee scheduled for testing shall not be notified the employee has been selected for testing until the specified time and date the employee is to report for testing;

(g) Upon the date of the next scheduled session of on-site random drug testing, the officer shall inform a test-designated employee selected for random drug testing the employee has been selected to submit to on-site random drug testing. This notification shall be made utilizing the highest possible degree of discretion and respect for the employee;

(h) The officer shall ensure that each test-designated employee selected for random drug testing shall arrive at the facility drug testing site at the scheduled time and shall monitor throughout the donor process; and

(i) A test-designated employee selected for random drug testing shall return to regularly assigned job duties upon successful completion of the donor process.

(2) Reasonable suspicion drug testing of test-designated employees shall occur under the following guidelines:

(a) A test-designated employee shall be subject to drug testing if there is reasonable suspicion that the employee has abused or misused a controlled substance, prescription medication, or nonprescription medication as prohibited in this administrative regulation;

(b) Reasonable suspicion drug testing shall take place as soon as possible following the determination that reasonable suspicion exists. This testing shall take place on-site at the facility;

(c) A test-designated employee required to submit to reasonable suspicion drug testing shall not provide direct care services until the drug test results have been reported;

(d) A determination that reasonable suspicion exists to require a test-designated employee to submit to drug testing shall be based on specific, immediate and clearly describable observations concerning the employee's appearance, behavior, speech or body odors. Observations may include indications of the chronic and withdrawal effects of controlled substances;

(e) A reasonable suspicion determination shall be made only under the following conditions:

1. An initial reasonable suspicion determination is made concerning a test-designated employee by an individual in a position of supervisory authority at the facility;

2. The initial reasonable suspicion determination is verified by the administrator on duty or the officer; and

3. Prior to a facility employee making an initial reasonable suspicion determination or a reasonable suspicion determination verification, the employee shall have first received department approved training and instruction on how to make a reasonable suspicion determination.

(3) Preappointment testing.

- (a) An individual applying for employment at a department-operated facility shall first submit to and successfully pass a drug test prior to gaining employment at the facility. Testing shall take place at an off-site testing site approved by the officer.
- (b) An individual shall not begin employment at a facility if a positive drug test result or a failed drug test has been reported for the individual.
- (c) An applicant who has a positive preappointment drug test result or who fails a preappointment drug test shall not be subsequently considered for appointment at a department operated facility for a period of at least one (1) year.
- (4) Follow-up testing.
 - (a) A test-designated employee shall submit to unscheduled follow-up drug testing if the employee has engaged in any of the following within the previous twenty-four (24) months:
 - 1. Voluntarily disclosed the misuse or abuse of a controlled substance or prescription or nonprescription medication;
 - 2. Entered into or completed a rehabilitation program for drug abuse;
 - 3. Had a positive drug test result reported or failed a drug test and dismissal did not occur;
 - 4. Reports a criminal drug statute conviction; or
 - 5. Been disciplined for violating this administrative regulation.
 - (b) A test-designated employee who is subject to follow-up drug testing shall not be required to submit to more than six (6) unscheduled follow-up drug tests within any twelve (12) month period.
 - (c) Follow-up drug testing shall take place at an off-site testing site as directed by the officer.

Section 10. Drugs Included.

- (1) If a drug test is administered pursuant to this administrative regulation on or after July 1, 2006, the department shall, at a minimum, test for:
 - (a) Marijuana;
 - (b) Cocaine;
 - (c) Opiates;
 - (d) Amphetamines;
 - (e) Phencyclidine;
 - (f) Morphine;
 - (g) MDMA (Ecstasy);
 - (h) Methadone;
 - (i) Benzodiazepines;
 - (j) Barbiturates; and
 - (k) Oxycodone.
- (2)
 - (a) If conducting reasonable suspicion drug testing, the department may test for any drug listed in Schedule 1 or 2 as defined in KRS Chapter 218A.
 - (b) Before the department tests for other drugs, it shall first obtain approval from the appointing authority.
 - (c) If requesting approval for the testing of other drugs, the department shall first submit to the appointing authority the agency's proposed initial test methods, testing levels, and proposed performance test program.
- (3) This administrative regulation shall not limit a contract agency which is specifically authorized by law to include additional categories of drugs in the drug testing of its own employees.
- (4) Initial and confirmatory drug testing conducted pursuant to this administrative regulation shall utilize cutoff levels as specified in the federal "Mandatory Guidelines for

Federal Workplace Drug Testing Programs".

(5) Drug test specimens that meet or exceed the cutoff levels as specified in subsection (5) of this section shall be reported as a positive test result.

(6) Drug test specimens that test below the cutoff levels as specified in subsection (5) of this section shall be reported as a negative test result and shall constitute a passed drug test. Further testing of a negative specimen for drugs shall not be permitted, and the negative specimen shall be discarded or pooled for use in a laboratory's internal quality control program.

Section 11. Employee Duty to Report Convictions. A test-designated employee shall report a criminal drug statute violation for which the employee was convicted within five (5) working days of the conviction to the facility's human resources office. A test-designated employee who reports a criminal drug statute conviction shall be subject to follow-up drug testing.

Section 12. Prescription and Nonprescription Medications.

(1) A facility employee taking a prescription or nonprescription medication prior to or during the employee's work shift shall immediately inform the employee's supervisor of this fact if:

(a) The instructions, indications, and contraindications associated with the medication give the employee reason to believe that the medication may in some way impair work performance; or

(b) Having once taken the medication, the employee begins to experience an unexpected, atypical, or adverse reaction to the medication, which impairs work performance.

(2) An employee who fails to comply with subsection (1) of this section shall be subject to disciplinary action, up to and including dismissal.

(3) Having been notified by an employee pursuant to subsection (1) of this section, the employee's supervisor shall closely monitor the employee's work performance throughout the employee's work shift. If the supervisor determines that there is a sufficient perceived impairment of the employee's work performance so as to raise concerns related to employee or patient safety, the supervisor shall notify the facility's administrator on duty or designee concerning the employee's impaired work performance. The administrator on duty shall then conduct an assessment and make a determination regarding the employee's impaired work performance.

(4) If the results of an assessment conducted pursuant to subsection (3) of this section indicate that the employee's work performance is impaired so as to raise concerns related to employee or patient safety, the administrator on duty shall:

(a) Temporarily assign the employee to nonpatient related duties, if the temporary reassignment does not place the employee at risk of injury or otherwise jeopardize the orderly operation of the facility; or

(b) Allow the employee to leave from work utilizing accumulated leave time.

(5) The employee shall be allowed to return to regular work duties if the results of an assessment conducted pursuant to subsection (3) of this section indicate that the employee's work performance is not impaired.

Section 13. Dilute Specimen.

(1) If a drug test is conducted in accordance with this administrative regulation and the test result is reported by the drug testing vendor as a dilute specimen, the officer shall:

(a) Inform the donor of the drug test result;

(b) Inform the donor that the donor shall be allowed one (1) opportunity to take a second drug test;

(c) Direct the donor to take the second drug test as soon as possible; and

- (d) Direct the donor not to ingest an excessive quantity of liquids prior to taking the second drug test.
- (2) A second drug test administered pursuant to subsection (1) of this Section in which the test result is reported by the drug testing vendor as a dilute specimen shall be considered a failed drug test.

Section 14. Incorporation by Reference.

- (1) "Mandatory Guidelines for Federal Workplace Drug Testing Programs", November 1, 2004, edition is incorporated by reference.
 - (2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Department for Behavioral Health, Developmental, or Intellectual Disabilities, 275 East Main Street, 4th floor, Frankfort, Kentucky 40621, Monday through Friday, 8 a.m. to 4:30 p.m.
- (32 Ky.R. 1352; 33 Ky.R. 261; 796; eff. 9-20-2006; TAm eff. 4-27-2016; Crt eff. 12-18-2019; TAm eff. 3-17-2020.)